

REMARKS

This is in response to the Official Action dated September 11, 2009. Claims 12-14 and 18 have been amended, claims 17 has been canceled without prejudice or disclaimer, and claim 21 have been added; as such, claims 12-16, and 18-21 are now pending in this application. Claims 12-14 are independent claims. Reconsideration and allowance is requested in view of the following remarks and claim amendments.

35 USC § 102 Rejections

Claims 12-19 have been rejected under 35 U.S.C. § 102(b) as being as being anticipated by Kimmel et al (US 6,910,481, hereinafter referred to as “Kimmel ‘481”). Applicants respectfully traverse this rejection.

To establish *prima facie* case of anticipation, “[t]he identical invention must be shown in as complete detail as is contained in the... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). “A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Claim 12 recites:

An oxygen concentrating apparatus which separates atmospheric oxygen to supply an oxygen-enriched gas to a user, the oxygen concentrating apparatus comprising:

an oxygen concentrating means for obtaining the oxygen-enriched gas by separating and concentrating atmospheric oxygen;

a detecting means for detecting presence/absence of breathing of the user;

a controlling means for controlling in such a manner that the oxygen enriched gas is supplied only during an inspiration period by a signal from the detecting means;

a recording means for recording supply history information which is a history of a supply condition of the oxygen-enriched gas supplied to the user; and

an output means and/or display means for sending and/or displaying the supply history information that has been recorded.

Kimmel '481 fails to disclose, teach, or suggest "an oxygen concentrating means for obtaining the oxygen-enriched gas by separating and concentrating atmospheric oxygen."

Moreover, Kimmel '481 fails to disclose, teach, or suggest a "a detecting means for detecting presence/absence of breathing of the user; a controlling means for controlling in such a manner that the oxygen enriched gas is supplied only during an inspiration period by a signal from the detecting means."

The Office Action, however, alleges these features can be found in col. 3, lines 40-52 and col. 4, lines 28-65 of Kimmel '481. This is wholly inaccurate.

Kimmel '481 relates to a modular compliance monitoring apparatus for use with a conventional pressure support system that monitors whether a patient is complying with a prescribed pressure support therapy delivered by that system. The monitor includes a housing having an inlet and an outlet, each of which is selectively connectable to the patient circuit so that the flow of gas in the patient circuit also passes through a passage provided through the housing. A sensor operatively coupled to the passage detects a parameter indicative of patient breathing. A processor disposed in the housing and receives the output of the sensor and determines, from the output of the sensor, whether the patient is breathing into the patient circuit, and outputs compliance data based on this determination.

In contrast, Applicants' invention provides an oxygen concentrating apparatus which enables a medical worker to certainly and easily know whether a patient on a home oxygen therapy, who continues to inhale an oxygen-enriched gas at home, performs the inhalation as prescribed, and an execution support method of the home oxygen therapy.

Kimmel '481 discloses a monitoring system for a pressure support system such as a pressure support device, such as a continuous positive airway pressure (CPAP) device. (Col. 1, ll. 16-17.) The CPAP device provides pressurized air to a patient and does not provide oxygen. The office action states on page 3, first paragraph, that the Kimmel et al. reference discloses an oxygen concentrating apparatus (see col. 3, lines 40-45), which is incorrect. The Kimmel et al. patent discloses combination of air and oxygen and does not discloses oxygen-enriched gas, in particular, does not discloses or suggests an oxygen concentrating means for obtaining the oxygen-enriched gas by separating and concentrating atmospheric oxygen as recited in claim 12.

Col. 3, lines 40-52 and col. 4, lines 28-65 of Kimmel '481 states:

Pressure generating system 34 receives a gas from a gas source, which is typically ambient atmosphere alone or in combination with a flow of oxygen, and outputs a flow of gas to patient circuit 36 at a pressure that is greater than atmosphere for delivery to the airway of a patient (not shown). Pressure generating system 34 commonly includes a mechanical pressure generator, such as a blower, bellows or piston, that receives ambient air, for example, at an inlet from the gas source. A pressure control system, such as a valve, a motor speed controller that controls to operating speed of the mechanical pressure generator, or both, controls the pressure of the flow of gas delivered to the patient via the patient circuit.

A sensor 52 is disposed within housing 44 and operatively coupled to passage 50 so as to detect a parameter indicative of patient breathing. The present invention contemplates that sensor 52 is any device, such as a pressure sensor, a flow sensor, a microphone, or a temperature sensor, that is capable of detecting a parameter associated with the gas in passage 50 that varies when the patient is breathing into the patient circuit. The output of the sensor is provided to a processor 54, which is preferably a microprocessor capable of implementing a stored algorithm. Processor 54 preferably includes a storage area 56 to store the operating algorithm, as well as any results from implementing that algorithm.

It should be noted that the present invention contemplates providing other optional sensors 53 to monitor other parameters from the flow of gas through passage 50. It is believed that the use of multiple sensors further enhances the reliability of the breathing detection. Of course, it also adds to the complexity and cost of the device.

The present invention further contemplates that compliance monitoring system 30 includes an input/output interface 58 for communicating, information, data and/or instructions and any other communicatable items, collectively referred to as "data", between a user and processor 54. Examples of common input/output interfaces

suitable for this purpose include a keypad and display. Other communication techniques, either hard-wired or wireless, are also contemplated by the present invention. For example, the present invention contemplates providing a smart card terminal that enables data to be loaded into processor 54 from a removable smart card 60 (See FIG. 1) or loaded onto the smart card from the processor. Other exemplary, interface devices and techniques adapted for use with the pressure support system include, but are not limited to, an RS-232 port, CD reader/writer, DVD reader/writer, RF link, modem (telephone, cable or other). In short, any conventional technique for providing, receiving, or exchanging data with processor 54 are contemplated by the present invention as input/output device 58. (Emphasis added.)

Clearly, Kimmel '481 does not disclose the detecting means and the "controlling means for controlling in such a manner that the oxygen enriched gas is supplied only during an inspiration period by a signal from the detecting means." The device disclosed in the Kimmel '481 patent continuously provides pressurized gas to a patient according to prescription given to the patient, and does not provide oxygen in a synchronized manner according to respiration of a patient.

Furthermore, there is no mention of a recording means for recording supply history information during the inspiration period; and output means and/or display means for sending and/or displaying the supply history information that has been recorded in Kimmel '481.

- Therefore, Kimmel '481 fails to teach or suggest various features of independent claim 12.

For reasons similar to those regarding claim 12, independent claims 13-14 and new independent claim 21 are similarly neither disclosed nor suggested by Kimmel '481. Dependent claims 15-16 and 18-19 are also neither disclosed nor suggested by Kimmel '481, for their incorporation of the distinct features recited in the respective independent claims, as well as for their own separately recited patentably distinct features.

Accordingly, Applicants respectfully request that the rejection of claims 12-19 under 35 U.S.C. § 102(b) as being anticipated by Kimmel '481 be withdrawn.

35 USC § 103 Rejections

Claims 20 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Kimmel ‘481 in view of Official Notice. Applicants respectfully traverse this rejection.

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974); *see also* MPEP 2143.03.

Additionally, if an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

Claim 20 depends from and thus incorporates the features of claims 12 which are neither disclosed nor suggested by Kimmel ‘481, for the reasons stated above.

At least for the reason disclosed above, claim 20 overcomes the combination of Kimmel ‘481 in view of Official Notice because it depends on independent claim 12 and thus incorporates the distinct features therein, as well as their separately recited patentably distinct features.

Accordingly, Applicants respectfully request that the rejection of claims 20 under 35 U.S.C. § 103(a) as being unpatentable over Kimmel ‘481 in view of Official Notice be withdrawn.

Conclusion

In view of the above amendment and remarks, applicants believe the pending application is in condition for allowance.

This response is believed to be a complete response to the Office Action. However, Applicants reserve the right to set forth further arguments supporting the patentability of their claims, including the separate patentability of the dependent claims not explicitly addressed herein, in future papers. Further, for any instances in which the Examiner took Official Notice in the Office Action, Applicants expressly do not acquiesce to the taking of Official Notice, and respectfully request that the Examiner provide an affidavit to support the Official Notice taken in the next Office Action, as required by 37 CFR 1.104(d)(2) and MPEP § 2144.03.

Extensions of time

Please treat any concurrent or future reply, requiring a petition for an extension of time under 37 C.F.R. §1.136, as incorporating a petition for extension of time for the appropriate length of time.

The Commissioner is hereby authorized to charge all required fees, fees under 37 C.F.R. §1.17, or all required extension of time fees.

Fees-general authorization

The Commissioner is hereby authorized to charge any deficiency in fees filed, asserted to be filed, or which should have been filed herewith (or with any paper hereafter filed in this application by this firm).

If any fee is required or any overpayment made, the Commissioner is hereby authorized to charge the fee or credit the overpayment to Deposit Account # 18-0013.

Dated: January 8, 2010

Respectfully submitted,

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